BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHELLEY WETHERELL and
JANELL STRADTNER,
Petitioners,

and

FRIENDS OF DOUGLAS COUNTY,
Intervenor-Petitioner,

vs.

DOUGLAS COUNTY,
Respondent,

and

GREAT AMERICAN PROPERTIES
LIMITED PARTNERSHIP,
Intervenor-Respondent.

LUBA No. 2009-004

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Shelley Wetherell, Umpqua, and Janell Stradtner, Roseburg, filed a petition for review and argued on their own behalf.

Ann B. Kneeland, Eugene, filed a petition for review and argued on behalf of intervenor-petitioner.

No appearance by Douglas County.

Stephen Mountainspring, Roseburg, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Dole, Coalwell, Clark, Mountainspring & Mornarich, P.C.

BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN, Board Member, participated in the decision.

AFFIRMED 04/30/2009

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county decision on remand determining that a 160-acre parcel is nonresource land and amending the comprehensive plan and zoning map designations to permit residential development on five-acre lots.

MOTIONS TO INTERVENE

Friends of Douglas County moves to intervene on the side of petitioners. Great American Properties Limited Properties, the applicant below, moves to intervene on the side of respondent. There is no opposition to either motion and both are allowed.

MOTION TO FILE REPLY BRIEF

Petitioners move for permission to file a reply brief of eight pages to address a number of arguments in the response brief that certain issues raised in the petition for review were waived.[1] A reply brief must be confined solely to "new matters" raised in the response brief. OAR 661-010-0039. Arguments that an issue is waived are proper subjects for a reply brief. *Caine v. Tillamook County*, 24 Or LUBA 627 (1993).

Intervenor-respondent (intervenor) objects to portions of the reply brief, arguing that in those portions petitioners improperly allege new procedural assignments of error, expand or recharacterize existing assignments of error, or simply provide additional argument in support of an assignment of error, rather than respond to the waiver challenges in intervenor's brief.

In responding to two waiver challenges, petitioners argue that new evidence was submitted without providing petitioners an opportunity to rebut the new evidence, and that petitioners cannot have waived issues related to that new evidence. We disagree with

[1] Petitioners and intervenor-petitioner Friends of Douglas County filed separate, but virtually identical petitions for review. For convenience, we address both petitions for review together and refer to both parties as "petitioners."

intervenor that that response alleges a new assignment of error. Petitioners do not ask for reversal or remand based on those allegations; rather, they provide a direct response to the waiver challenge.

In responding to another waiver challenge, petitioners argue that intervenor misunderstands the "issue" that petitioner believes is raised in the petition for review and that intervenor contends is waived. Petitioner attempts to clarify that issue, and provides a record citation to identify where that issue was raised. Although it is a close question, we believe it is proper to include in a reply brief argument over the nature of the "issue" that is raised in the petition for review, in order to resolve a dispute over whether that "issue" was waived. At some point, such argument may be viewed as an improper amendment to or recharacterization of an existing assignment of error, but we cannot say that the argument offered here exceeds that threshold.

Finally, intervenor argues that a paragraph on page 5, lines 9-14 does not respond to a waiver challenge, but simply provides additional argument on an issue raised in the petition for review. In the response brief, intervenor argues that petitioners waived the issue of whether a consultant's study failed to address certain farm management practices, by failing to raise that issue below. In the disputed paragraph, petitioners cite to record pages that describe farm management practices that the study allegedly did not address. We understand petitioners to argue that examination of the record citations will demonstrate that the allegedly waived issue was raised below. Whatever the merits of that argument, the disputed paragraph appears to be a response to the waiver challenge, and is therefore appropriate.

Intervenor does not object to the length of the reply brief, or any other portion of it. The reply brief is allowed.

FACTS

The present appeal is on remand from LUBA and the Oregon Supreme Court, and has a lengthy appellate history reaching deep into Roman numerals. *Wetherell v. Douglas*

County, 50 Or LUBA 167 (2005) (*Wetherell I*), *rev'd in part, aff'd in part* 204 Or App 732, 132 P3d 41 (2006) (*Wetherell II*), *rev'd and rem'd*, 342 Or 666, 160 P3d 614 (2007) (*Wetherell III*). We repeat the summary of material facts from our opinion in *Wetherell I*:

> "The subject property is a 160-acre irregularly-shaped parcel south of the Melrose Rural Community, near the City of Roseburg. The property carries a comprehensive plan designation of Farm Forest Transitional and a zoning designation of Exclusive Farm Use—Grazing (FG). Melrose Road borders the property on the west, and Colonial Road on the south. Across Melrose Road is a 195-acre parcel also zoned FG that is used to grow hay. As explained below, that parcel was until recently part of a single ranch that included the subject property. Resource-zoned lands generally lie to the south and east, with a few rural residential-zoned properties directly south. North and north-east lie lands zoned for rural residential use.
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> "Topographically, the subject property slopes up from Melrose Road to a north-south ridge. The ridge slopes down to Champagne Creek, which cuts across the north-eastern portion of the parcel. The subject property consists mainly of unimproved pasture, interspersed with brush, rocky areas, and scattered trees. The property is fenced and cross-fenced, and includes two small spring-fed ponds. A small stand of conifers is located in the southern portion, and trees cover approximately 30 percent of the property. Soils on the subject property consist of 79 acres of Dickerson soils, Class VII, 48 acres of Nonpareil soils, Class VI, 19 acres of Speaker soils, Class III-IV, and 16 acres of Josephine soils, Class II-IV. Approximately 78 percent of the property consists of Class VI and worse soils, and 22 percent Class II-IV soils.
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> "For seventy years, from 1930 to 2000, the subject property was the eastern half of a 387-acre ranch owned by John B. Richards and family. Until 1982, Richards grew hay on the west half of the ranch, and grazed livestock on both halves, including the subject parcel. The west half, which included the 195-acre parcel west of the subject property, consisted of Class I-IV agricultural soils. In 1982, Richards rented the entire ranch to a series of tenants who continued to grow hay on the west half and graze cattle on both halves. However, the productivity of the subject property declined over this period, due to overgrazing and lack of proper maintenance, such as brush control. In 1996, Richards logged a portion of the subject property. In 2000, Richards sold the west half of the ranch to Napier, who continued to grow hay on that half. In 2002, Richards sold the remainder of the ranch, the subject property, to DeCoite. DeCoite grazed 21 heifers on the subject property in 2002. In November 2003, [intervenor] acquired the subject property. In December 2003, intervenor advised the county that the property was no longer in farm use and requested that the county remove the preferential tax assessment." *Wetherell I,* 50 Or LUBA at 170-71.

In *Wetherell I*, we remanded the county's initial decision concluding that the subject property is not agricultural land under Statewide Planning Goal 3 (Agricultural Land), which was based on the county's conclusion that grazing or other agricultural use of the subject property could not yield a net "profit in money." We held in part that the county's conclusions violated OAR 660-033-0030(5), which prohibits consideration of "profitability" in determining whether land is agricultural land subject to Goal 3.

In *Wetherell III*, the Supreme Court invalidated OAR 660-033-0030(5) as being inconsistent with ORS 215.203(2)(a), which defines "farm use" in relevant part to mean the "current employment of land for the primary purpose of obtaining a profit in money," by engaging in specified agricultural related activities.[2] The Court remanded the county's decision to LUBA for reconsideration in light of its analysis. In turn, we remanded the decision to the county, explaining:

> "On remand, our task is to re-evaluate our disposition of the first assignment of error in light of the Court's interpretations in *Wetherell III*. In our view, remand is still necessary under the first assignment of error for the following reasons.
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> "First, we held that the county's conclusion that the property is not agricultural land was based on an approach that 'would be error even if OAR 660-033-0030(5) did not apply.' 50 Or LUBA at 185. Specifically, we found that the county had erroneously applied a 'commercial-scale' approach that considered the property suitable for farm use only if it could support grazing or other farm uses at a relatively large scale or intensity. Neither the Court of Appeals' nor the Supreme Court's opinions disturb that portion of our decision. We continue to believe that the county erred in that regard. If 50-60 cattle can be seasonally grazed on the subject property (consistent with historic use of the property) or a small vineyard established with a reasonable expectation of yielding a profit in money, the fact that the cattle operation or

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[2] ORS 215.203(2)(a) provides, in relevant part:

> "As used in this section, 'farm use' means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. * * *"

> vineyard and any resulting profit may be relatively small in size is not a sufficient basis to conclude that the subject property is not suitable for farm use under the Goal 3 rule. Because the county's findings repeatedly dismiss small-scale farm uses as 'lifestyle' farm uses, without appearing to recognize that such small-scale uses may in fact constitute 'farm use' as defined in ORS 215.203(2)(a), remand is necessary to adopt findings free of that error.
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> "Second, we held in *Wetherell I* that the county's findings failed to adequately address OAR 660-033-0030(3), which provides that 'Goal 3 attaches no significance to ownership of a lot or parcel when determining whether it is agricultural land,' and that '[n]earby or adjacent land, regardless of ownership, shall be examined' in determining whether land is suitable for farm use under OAR 660-033-0020(1)(a)(B). Specifically, we concluded that the county erred in summarily dismissing use of the property in conjunction with the adjacent Napier property, the other half of the ranch that the subject property was part of until 2000. Further, the county failed to address conjoined use with the Mellors' property, nearby ranchers who formerly leased the subject property and who expressed interest in leasing it again for use in conjunction with their ranch operation. Again, neither the Court of Appeals' nor Supreme Court's opinions disturbed that aspect of *Wetherell I*, and we continue to believe that error among others identified in the first assignment of error warrants remand.
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> "In sum, though the county did not err in considering 'profitability,' the county's findings nonetheless fail to demonstrate that the subject property is not 'suitable for farm use' under OAR 660-033-0020(1)(a)(B). On remand, the county must adopt findings free of the errors identified in *Wetherell I*, as modified by this opinion, and consistent with the Court's holdings in *Wetherell III*." *Wetherell v. Douglas County*, 54 Or LUBA 646, 651-53 (2007) (*Wetherell IV*) (footnote omitted).

On remand from *Wetherell IV*, the county board of commissioners remanded the matter to the county planning commission for additional evidentiary hearings. The planning commission held a hearing limited to the two assignments of error that were remanded in *Wetherell I* and *IV*. At the hearing, intervenor submitted new evidence, and petitioners submitted testimony in opposition. On November 20, 2008, the planning commission approved the application, based on findings that the subject property is not resource land protected by Goal 3 or Statewide Planning Goal 4 (Forest Lands).[3]

[3] The county's findings addressing the second basis for remand under Goal 4 are not challenged in the present appeal.

The county board of commissioners conducted a hearing on the planning commission's decision. Petitioners appeared at the hearing and submitted testimony in opposition. On December 17, 2008, board of commissioners affirmed the planning commission decision and adopted its findings as its own. This appeal followed.

ASSIGNMENT OF ERROR

In two subassignments of error each comprised of multiple sub-subassignments of error, petitioners challenge the county's conclusion on remand that the subject property is not suitable for farm use, and therefore not agricultural land as defined under OAR 660-033-0020(1)(a)(B).[4]

In the response brief, intervenor makes a global exhaustion/waiver argument against all issues raised in the petition for review, as well as a number of specific waiver challenges to particular issues. We first address the general exhaustion/waiver argument.

A. Exhaustion under ORS 197.825(2)(a) and Exhaustion/Waiver under *Miles v. City of Florence*

Intervenor contends that petitioners failed to exhaust an available local appeal, and therefore LUBA lacks jurisdiction over this appeal, under ORS 197.825(2)(a).[5] In addition, or in the alternative, intervenor argues that because petitioners failed to file a local notice of appeal specifying issues on appeal, petitioners have waived all of the issues raised in the

[4] OAR 660-033-0020(1)(a) defines "agricultural land" in relevant part to include:

> "(A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon;
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> "(B) Land in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices[.]"

[5] ORS 197.825(2)(a) provides that LUBA's jurisdiction is "limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]"

petition for review, under the reasoning in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), and therefore the county's decision should be affirmed.

Because the challenged decision is a comprehensive plan amendment, the board of commissioners is required to adopt the county's final decision, after providing a hearing. ORS 197.615(1); ORS 215.050; ORS 215.060. Douglas County Land Use and Development Ordinance (LUDO) chapter 6 governs quasi-judicial comprehensive plan amendments. Under LUDO 6.800 and 6.900, the county planning commission or hearings officer makes the initial decision on a quasi-judicial comprehensive plan amendment, but the board of commissioners makes the county's final decision. Depending on the nature of the plan amendment, the planning commission decision may be forwarded to the board of commissioners in one of three ways, subject to different review procedures.[6]

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[6] LUDO 6.900 provides, in relevant part:

> "1. Within 30 days of a signed Plan amendment decision, except for any Plan Amendment for which an exception is required under ORS 197.732 or for any lands designated under a statewide planning goal addressing agricultural lands or forestlands, the Board shall adopt an order affirming the Findings, Conclusions and Decision of the Commission or Hearings Officer at a regular public meeting unless the Board elects to review the decision on their own motion or Notice of Review has been filed.
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> "2. Within 30 days of a signed Plan Amendment decision for which an exception is required under ORS 197.732 or which involves lands designated under a statewide planning goal addressing agricultural lands or forestlands, the Board shall hold a hearing, limited to the record established by the lower authority, at a public meeting unless the Board elects to review the decision on their own motion or Notice of Review has been filed. At the hearing, or at a subsequent hearing, the Board shall take final action on the decision of the Commission or the Hearings Officer.
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> "a. Notice of the hearing shall be provided only to those parties qualified by the Commission or Hearings Officer. Such notice shall be mailed at least 7 days in advance of the Board hearing.
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> "b. Parties shall be given an opportunity to speak at the hearing.
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> "c. A copy of the Board decision shall be mailed to the qualified parties.
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> "3. If a Notice of Review is filed with the Director, the Board shall review the decision pursuant to §2.500 and 2.700 and the hearing procedure provided in Chapter 2 of the Ordinance."

For a plan amendment involving land designated as agricultural or resource lands, LUDO 6.900(2) provides that the board "shall hold a hearing, limited to the record established by the lower authority, at a public meeting unless the Board elects to review the decision on their own motion or a Notice of Review is filed." LUDO 6.900(3) specifies that if a notice of review is filed, the board reviews the decision under the hearing procedures at LUDO 2.700, which sets out the general procedures that govern the board's review of a lower body's decision. Similarly, LUDO 6.800(3) specifies that if the board elects to review the lower body's decision on its own motion the review shall be conducted pursuant to LUDO 2.700. Apparently, where the board's review of a comprehensive plan amendment involving resource lands is not triggered by either a notice of review or the board's own motion, the applicable procedures for the required hearing are those set out in LUDO 6.900(2)(a) through (c), and the general hearing procedures at LUDO 2.700 do not apply.

In the present case, no notice of review was filed, the board did not elect to review on its own motion, and therefore the board's review was conducted under LUDO 6.900(2)(a) through (c) rather than LUDO 2.700. Intervenor argues that petitioners could have filed a notice of review of the planning commission decision, and had they done so petitioners would have been required under LUDO 2.500(5)(c) to specify the grounds for the appeal. In that circumstance, intervenor argues, the board would have conducted a hearing under the procedures in LUDO 2.700, and the board's review would been limited to the grounds relied upon in the notice of review. LUDO 2.700(2).[7] Because petitioners did not avail themselves of that local appeal right, intervenor argues, petitioners failed to exhaust their administrative remedies and therefore this appeal must be dismissed, under ORS 197.835(2)(a).

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[7] LUDO 2.700(2) provides:

> "Review by the Board shall be a de novo review of the record limited to the grounds relied upon in the notice of review, or cross review, if the review is initiated by such notice."

LUBA has consistently held that where the governing body is required by law to adopt the final decision, as is the case with comprehensive plan amendments, ORS 197.835(2)(a) does not require the petitioner to file a local appeal of a lower body's initial decision to the governing body, in order to invoke LUBA's jurisdiction over the governing body's final decision. *Wasserburg v. City of Dunes City*, 52 Or LUBA 70, 86 (2006); *Home Depot, Inc. v. City of Beaverton*, 37 Or LUBA 1020, 1029 (2000); *Standard Insurance Co. v. City of Hillsboro*, 17 Or LUBA 886 (1989). Similarly, in *Colwell v. Washington County*, 79 Or App 82, 91, 718 P2d 747 (1986), the Court held that a petitioner need not perfect a local appeal to the governing body on a comprehensive plan amendment, where the applicable statutes require the governing body to conduct a hearing on the amendment in any event.

We understand intervenor to argue that in *Miles* the Court of Appeals implicitly overruled or modified *Colwell* and similar cases, or that such cases are distinguishable from the present circumstances. *Miles* involved a permit decision where the petitioner raised certain issues at the planning commission hearing and/or at the city council hearing, but failed to list those issues as a basis for appeal in their notice of local appeal to the city council. In those circumstances, the Court held, the exhaustion requirement of ORS 197.825(2)(a), read together with the raise it or waive it principles in ORS 197.763(1) and ORS 197.835(3), require that "a party may not raise an issue before LUBA when that party could have specified it as a ground for appeal before the local body, but did not do so." 190 Or App at 510. However, *Miles* did not involve a comprehensive plan amendment or similar type of decision where the governing body is required by law to render the final decision on a lower body's initial decision. Neither did *Miles* involve local law that provided three ways the lower body's decision could be placed before the governing body. Nothing cited to us in *Miles* suggest that the Court intended to overrule *Colwell* or is likely to extend

the reasoning in *Miles* to circumstances where no local appeal is necessary in order to obtain the governing body's review of a lower body's initial decision.

Intervenor recognizes that in *Wasserburg*, we declined to extend *Miles* to require the petitioner to file a local appeal of a planning commission recommendation to the city council, to approve a zoning map change and planned unit development subdivision, where the city council was required to adopt the city's final decision.[8] However, intervenor argues that *Wasserburg* is distinguishable, because under the city's procedures there was no right of local appeal, no requirement that an appellant specify the basis for appeal, and no opportunity to do so. Further, intervenor argues, in *Wasserburg*, the planning commission decision was simply a recommendation. Under LUDO 6.800(1), intervenor contends, the planning commission decision on a comprehensive plan amendment is a "final" decision, unless a notice of review is filed or the board elects to review the planning commission decision on its own motion.[9]

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[8] In *Wasserburg*, we stated:

> "* * * Intervenor recognizes that the petitioners in *Miles* had a right of appeal that called for the opponents to specify the basis for their appeal to the city council in a local notice of appeal, whereas the proceedings before the city council in this case were required in any event and there was no need for a local appeal, no right of local appeal and therefore no local requirement that petitioners specify the bases for a local appeal. Intervenor argues '[t]hat difference is immaterial.' Intervenor-Respondent's Brief 17.
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> "We do not agree that the difference is immaterial. We understand intervenor to argue that the exhaustion requirement of ORS 197.825(2) should be applied in cases like the present one to require that a petitioner at LUBA must have personally raised an issue each time the local land use proceedings moved from one local decision making body to another, even if that move is not pursuant to a local appeal. That would be a significant extension of the holding in *Miles* that we doubt the Court of Appeals would find supportable under the ORS 197.825(2) requirement for exhaustion of local remedies. We decline intervenor's invitation to extend the holding in *Miles* * * *." 52 Or LUBA at 86.

[9] LUDO 6.800 provides:

> "1. Ten (10) days from the date of the Commission or Hearings Officer decision, *the decision shall become final* unless a Notice of Review is filed pursuant to §2.500 of this ordinance. An appeal shall be heard by the Board pursuant to §2.700. However, the Commission or Board may review the lower decision on its own motion by

LUDO 6.800(1) does state that the planning commission or hearings officer's decision is "final" unless an appeal is filed or the board elects to review the decision. However, read in context with LUDO 6.900(1) and (2), it is clear that with respect to all comprehensive plan amendments the board makes the county's final decision, as required by statute. *See* n 6. Under LUDO 6.900(1), for comprehensive plan amendments that do not require an exception or involve resource lands, the board's final action where no appeal is filed or review elected appears to be limited to a perfunctory approval of the planning commission's initial decision.[10] However, under LUDO 6.900(2), with respect to comprehensive plan amendments that require an exception or involve resource lands, where no appeal is filed and the board does not elect to review the amendment the board nonetheless conducts a hearing and issues the county's final decision approving or denying the plan amendment. At least where the board takes action under LUDO 6.900(2), the planning commission's decision is not "final" in any meaningful sense of the word, notwithstanding the language of LUDO 6.800(1). In this respect, *Wasserburg* is not distinguishable.

It is true that even where LUDO 6.900(2) applies the county's code offers a local appeal as one possible, if somewhat redundant, path to board review. That circumstance was not present in *Wasserburg*, where there was apparently no right or opportunity to file a local appeal. Intervenor argues that

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> adopting an order or resolution within 10 days from the date of the Commission or Hearings Officer decision.
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> "2. If the Commission elects to review the decision of the Hearings Officer on its own motion, notice shall be given pursuant to §2.500.3 of this ordinance. A hearing shall be held and decision rendered pursuant to §2.600 and the hearing procedure provided in Chapter 2 of this ordinance.
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> "3. If the Board elects to review the decision on its own motion, notice of hearing shall be given pursuant to §2.500.3 and review shall be conducted pursuant to §2.700 and the hearing procedure provided in Chapter 2 of this ordinance." (Emphasis added).

[10] That approach is arguably inconsistent with the ORS 215.060 obligation for the county governing body to hold a "public hearing" on any action regarding the plan, but we need not and do not address that question.

> "the county and the land use process would have significantly benefited if petitioners had filed a notice of review for all the reasons set forth in *Miles* pertaining to process efficiency. Under LUDO [7.500], if petitioners had filed a notice of review, the county would have conducted an expanded review which provides significantly more procedural rights to participants and requires the county to focus specifically on the grounds of appeal." Response Brief 7.

Intervenor is correct that if petitioners had chosen to file a notice of review and specified the grounds for appeal, as required by LUDO 2.500(5)(c), the board's review would probably have focused on, indeed been confined to, the grounds cited in the notice, under LUDO 2.700(2). That would arguably further one or more of the purposes behind the ORS 197.825(2)(a) exhaustion requirement, as explained in *Miles*.[11] However, as explained above there is considerable doubt whether the Court would extend the reasoning in *Miles* to circumstances, such as the present one, where the governing body is required by law to review a lower body's decision in any event. Further, it is important to note that nothing in the LUDO limits the issues that can be raised at the hearing required by LUDO 6.900(2) or otherwise confines the board's review, in circumstances when no notice of review is filed. LUDO 6.900(2) provides three pathways by which a lower body's decision on a comprehensive plan amendment can come before the board of commissioners. Only one of those pathways, the filing of a notice of review, triggers a code obligation for the appellant to specify the grounds for the appeal, and under LUDO 2.700(2) the board's review is expressly limited to the grounds so specified. However, LUDO 2.700(2) applies only if "the review is initiated by such notice." By implication, where the board's review is triggered under the

[11] In *Miles*, the Court identified four purposes of the exhaustion requirement: (1) allowing the county decision making process to run its course without interruption, (2) allowing the governing body, the source of local ordinances, to clarify and determine factual and policy issues presented by land use controversies, (3) allowing the increasing possibility of compromise and avoidance of land use litigation, and (4) promoting the opportunity for development of a more complete, well-organized record. 190 Or App at 506, citing *Lyke v. Lane County*, 70 Or App 82, 85-86, 688 P2d 411 (1984).

other two pathways, the board's review is not confined to the grounds listed in a notice of review, because there is no requirement to file a notice of review.

Indeed, as noted above, it appears that LUDO 2.700 does not apply at all when no notice of review is filed and the board does not elect to review the decision, and the board's review is compelled only by LUDO 6.900(2) and the statutory obligation to conduct a public hearing. Instead, the brief procedures set out in LUDO 6.900(2)(a) through (c) appear to govern. LUDO 6.900(2)(b) provides that the "[p]arties shall be given an opportunity to speak at the hearing," and that right is implicit in the ORS 215.060 requirement that the governing body hold a "public hearing." Under intervenor's view, there would be no purpose in allowing any parties to speak at the hearing, because in the absence of a notice of review the board could simply ignore any testimony offered or issues raised at the hearing. That would make the hearing required by ORS 197.615(1), ORS 215.050, ORS 215.060, and LUDO 6.900(2) an empty procedural exercise.

For the foregoing reasons, we disagree with intervenor that the petitioners were required to file a notice of review of the planning commission decision in order to exhaust their administrative remedies, for purposes of ORS 197.825(2)(a). Accordingly, we decline to dismiss this appeal. For the same reasons, we disagree with intervenor that the reasoning in *Miles* should be extended to include the present circumstances, with the result that petitioner's failure to file a notice of review specifying grounds for appeal means that all of the issues raised below and raised in the petition for review are waived or beyond LUBA's scope of review.

B. ORS 197.763(1) Raise It or Waive It (Fair Notice Waiver)

In its response brief, intervenor advances nearly two dozen separate claims that certain issues or arguments made by petitioners were not raised below, and thus are waived, under ORS 197.763(1) and 197.835(3). In their overlength reply brief, petitioners respond to each claim, generally citing record pages where they believe the issue was raised below.

Resolving each of those disputed waiver claims would significantly complicate and lengthen an already lengthy opinion.

However, as it happens, under our analysis of the merits none of the waiver claims are dispositive or have any impact on our resolution of the merits. That is, waiver claims are advanced only with respect to issues where we would reject petitioners' arguments on their merits, even assuming the issues those arguments are directed to were raised below. Accordingly, we need not and do not resolve intervenor's waiver claims under ORS 197.763(1).

C. Petitioners' Arguments on the Merits

1. First Sub-Assignment of Error

Petitioners' first sub-assignment of error includes four distinct sub-subassignments of error. The first two sub-subassignments of error challenge the evidentiary support for the county's finding that the subject property is not suitable for grazing as an independent grazing operation. The third sub-subassignment challenges the county's finding that the subject property cannot be put to farm use in conjunction with other nearby land. Under the fourth sub-subassignment of error, petitioners argue that the county misconstrued the applicable law by placing too much weight on "profitability." Because the issue raised under the fourth sub-subassignment is central to resolving the remaining sub-subassignments of error, we turn to that issue first.

a. Weight Given to Considerations of Profitability

As noted, in *Wetherell III*, the Oregon Supreme Court invalidated an administrative rule that prohibited consideration of "profitability or gross farm income" in determining whether land is agricultural land under Goal 3, as being inconsistent with ORS 215.203(2)(a). The Court held that "[t]he factfinder may consider 'profitability,' which includes consideration of the monetary benefits or advantages that are or may be obtained from the farm use of the property *and* the costs or expenses associated with those benefits, to

the extent such consideration is consistent with the remainder of the definition of 'agricultural land'" in Goal 3." 342 Or at 682. However, the Court rejected an argument advanced by the same intervenor in the present appeal that the meaning of "profit" is limited to "net operating income after deducting operating expenses," in the tax or accounting sense.[12] While net operating profit may be considered, the Court cautioned that the term "profit in money" as used in ORS 215.203(2)(a) has a special meaning, given its statutory, goal and rule context. The Court noted, for example, that ORS 215.203(2)(b) defines "current employment" of land for farm use to include activities or conditions that produce no revenue whatsoever. *Id*. at 681, n 13.

Finally, the Court declined to consider what weight or role consideration of profitability carries in determining whether land is "suitable for farm use" under OAR 660-033-0020(1)(a)(B):

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[12] The Court stated:

> "[P]etitioners' proposed definition of profit to mean only 'net operating profit' also is inconsistent with ORS 215.203(2)(a), because it focuses on current or potential profitability in a tax or accounting sense, while that statute and Goal 3 require the local government to determine whether the land is 'suitable' for current use 'for the *primary purpose* of obtaining a profit in money" through certain agricultural or farm activities. (Emphasis added.) As this court has been careful to recognize, '[l]and use laws reflect different policies than tax laws.' *King Estate Winery, Inc. v. Dept. of Rev.*, 329 Or 414, 422, 988 P2d 369 (1999). With respect to 'farm use' determinations for tax purposes, the legislature has stated its intent, in part, to ensure that '*bona fide farm properties* be assessed * * * at a value that is exclusive of values attributable to urban influences or speculative purposes.' ORS 308A.050 (emphasis added). In such a context, strictly defining 'profit' as a current year income-after-expenses accounting calculation is appropriate, because it allows for a more precise description of the discrete class of properties that are entitled to certain tax benefits due to their *current* operation as bona fide farms. In contrast, the identification of land that is 'suitable for farm use' under Goal 3 can involve the consideration of factors as diverse as soil type, water availability, land use patterns, required energy inputs, and accepted farming practices. Land can be suitable for economically successful and sustainable farm use and yet the landowner, because of tax and accounting concepts such as accelerated depreciation and loss carry-forwards, legitimately may show a net operating loss from such use. For those reasons, petitioners' proposed tax-based definition of 'profit in money' to mean *only* net operating income after deducting operating expenses is inconsistent with the text and context of ORS 215.203(2)(a). Nevertheless, as set forth above, petitioners are correct to the extent that they argue that net operating profit properly can be *considered* in determining whether land can be employed for the primary purpose of obtaining a profit in money." 342 Or at 680-81. (emphasis original, footnote omitted).

> "Although profitability and gross farm income—both actual and potential—may be considered in determining whether land is suitable for farm use, we do not address the weight to be given to those considerations in any particular land use decision. In their arguments before LUBA, the Court of Appeals, and this court, the parties and *amici* appear to assume, at times, that, if particular land currently is 'profitable' or produces 'gross farm income,' then that land necessarily meets the 'farm use' test and is properly classified as agricultural land under Goal 3, whereas if the land is 'unprofitable' for farming or produces no 'gross farm income,' then it necessarily is not agricultural land under Goal 3. The case before us, in its particular posture, does not present those issues. The determination that a particular parcel of land is 'agricultural land' turns instead on the local government's conclusion, subject to review by LUBA and the courts, that the land is '*suitable* for farm use,' taking into consideration the factors identified in Goal 3. The only issue that we decide today is whether 'profitability' or 'gross farm income' can be *considered* by the local government in making its land use decision, and our decision is limited to holding that the rule prohibiting the local government even from considering such evidence is invalid." *Id.* at 683 (emphasis in original).

In the present case, petitioners argue that the county erred in giving preponderant weight to consideration of profitability, based on the studies intervenor submitted on remand that extensively analyzed whether the subject property can be put to grazing or vineyard use and yield a net annual profit, after deducting expenses.

Intervenor responds that the county appropriately considered all of the factors listed in Goal 3 and OAR 660-033-0020(1)(a)(B) to determine whether the property is "suitable for farm use as defined at ORS 215.203(2)(a)," and gave appropriate consideration to whether a reasonable farmer would attempt to employ the property for grazing or viticulture, with the primary purpose of obtaining a profit in money. According to intervenor, the Day report concluded that the annual and amortized expenses of conducting a grazing operation using accepted farm practices far exceed the likely annual revenues, given inherent limitations such as poor soils and the current neglected condition of the property. Similarly, intervenor argues, a vineyard consultant provided a report concluding that the long-term capital and operating expense of developing a 20-acre vineyard on the Class II-IV soils on the property would far exceed any revenue that could reasonably be expected.

We generally agree with petitioners' premise, that the considerations listed in OAR 660-033-0020(1)(a)(B)—soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, and accepted farming practices—are the primary drivers of any determination under the rule whether land is "suitable for farm use" as defined in ORS 215.203(2)(a). It is less clear to us what role or weight should be given to considering whether the activities listed in ORS 215.203(2)(a) can be conducted with the "primary purpose of obtaining a profit in money." As the Supreme Court suggested in *Wetherell III*, that language has a specialized function and meaning within the context of the statute, but the Court gave little guidance on what role that language plays in determining whether land is suitable for farm use, under the considerations listed in OAR 660-033-0020(1)(a)(B).[13]

Elsewhere in the petition for review, petitioners critique the Day report, arguing that the approaches it took and many of the assumptions and variables it used were chosen to yield the desired outcome. Petitioners argue that "[a]llowing an applicant to manipulate 'profitability' to show whatever outcome is desired is not consistent with the text or context of Goal 3 or OAR 660-033-0020(1)(a)(B) and is not a result that the legislature ever could have intended." Petition for Review 14. Intervenor responds in general that the assumptions in the Day report are reasonable and conservative, and even if different assumptions are used the gap between annual income and annual and amortized expenses is so large that under no likely scenario would a prudent farmer be motivated to graze the subject property alone or in conjunction with other property with the expectation of obtaining a profit in money.

[13] The Court noted that the Land Conservation and Development Commission (LCDC) could adopt rules regarding the manner in which "profit in money" should be considered in such matters, but to our knowledge LCDC has not adopted any rules on that subject. 342 Or at 682, n 14.

We generally agree with petitioners that an economic analysis like that of the Day report is highly manipulable, and can yield dramatically different results depending on what variables are assumed and what approaches are used. To take one example, by far the largest of the assumed expenses under the Day report is for fertilizer, in amounts and at intervals in excess of the amounts and intervals applied to the property in its previous history of grazing, even though the Day report concludes that application of fertilizer in those amounts would be uneconomical and not significantly improve productivity. The parties dispute, among many other things, whether "accepted farming practices" would include annual application of fertilizer and in such amounts on the subject property. We do not resolve that dispute here, but it illustrates the difficulty in assigning the appropriate role and weight to an economic analysis such as the Day report. Depending on what assumptions and variables are used, such economic analyses could easily conclude that is "unprofitable" to graze land that historically has been grazed profitably or, for that matter, that it is "profitable" to graze land that in fact cannot be grazed profitably. In *Wetherell III*, the Court seemed to caution against relying too heavily on such economic analyses of profitability. *See* 342 Or at 683 (rejecting arguments that "if particular land currently is 'profitable' or produces 'gross farm income,' then that land necessarily meets the 'farm use' test and is properly classified as agricultural land under Goal 3, whereas if the land is 'unprofitable' for farming or produces no 'gross farm income,' then it necessarily is not agricultural land under Goal 3").

In our view, while profitability is a permissible consideration in determining whether land is agricultural land under the rule definition, it is a relatively minor consideration, and one with a large potential for distracting the decision maker and the parties from the primary considerations listed in the rule definition—soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, and accepted farming practices. Because an economic analysis such as the Day report yields hard numbers, it is easy to

assign an unwarranted significance to the analysis, and fail to appreciate that it is based on highly variable assumptions regarding hypothetical farm uses, and that its conclusions are only as reliable as its assumptions.

In the present case, the county's findings on remand extensively discuss profitability and rely heavily on the Day report to conclude that the subject property is not suitable for farm use as defined in ORS 215.203(2)(a), in part because the county believed, based on the Day report, that no farm use of the property could reasonably be expected to yield a profit. That extended discussion of profitability is not surprising, as LUBA directed the county to adopt findings on remand considering profitability. The county's findings also extensively discuss the considerations set out in OAR 660-033-0020(1)(a)(B), and conclude based on those considerations that the property is not agricultural land under the definition.[14] We cannot say, and petitioner has not demonstrated, that the county's findings on remand place preponderant or inappropriate weight on profitability or in considering profitability fail to give sufficient weight to the factors listed in OAR 660-033-0020(1)(a)(B). The fourth sub-subassignment of error is denied.

b. Suitable for Grazing as an Independent Grazing Operation

The bulk of the Day report, and the county's findings, evaluate whether the subject property is suitable for agricultural use, particularly grazing, as an independent agricultural operation, as opposed to in conjunction with nearby agricultural operations. That emphasis seems somewhat misplaced, because except for a very brief period in its 70-year history of

[14] The county's concluding paragraph under Goal 3 states:

> "We have considered the seven factors of OAR 660-033-0020(1)(a)(B), appropriate scales of farming, and combinations of the subject property with other operations. Because of the severe limitations of the property due to low soil fertility, lack of irrigation water, southwest aspect, the technology and energy inputs required, and limitations on accepted farming practices, no reasonable farmer would consider using the property for a farm operation, whether it be a small local scale, a large commercial scale, or some other arrangement, alone or in combination with other properties. In conclusion, the subject property is not suitable for farm use." Record 21.

grazing use the subject property has always been used as part of a larger livestock and hay operation, in conjunction with nearby lands. Given that long-standing historic use pattern, an obvious starting point for the analysis would seem to be whether the property continues to be suitable for farm use in conjunction with nearby grazing operations. As discussed below, OAR 660-033-0030(3) provides in part that "Goal 3 attaches no significance to the ownership of a lot or parcel when determining whether it is agricultural land" and that "[n]earby or adjacent land, regardless of ownership, shall be examined" in determining whether the subject property is suitable for farm use. With respect to the issue of conjoined use, the Day report generally took the approach of assuming that many of the expenses identified for an independent operation would also apply to conjoined use, with the result that, while the estimated annual loss would be smaller, use of the subject property would be a component of any joint operation that would ultimately lose money for the operator.

The first and second sub-subassignments of error challenge the credibility and validity of the Day report, as well as many of its assumptions, in evaluating the profitability of an independent grazing operation on the subject property. As noted, intervenor asserts that a number of those challenges are waived. We need not address those waiver challenges, because even if the disputed issues and challenges were not waived, we generally agree with intervenor that petitioners have not established that the county erred in concluding that the subject property is not suitable for farm use, with respect to its use as an independent grazing operation.

As noted, the subject property has never been used for an independent agricultural operation of any kind, with one brief and unsuccessful exception. The Day report explains that establishing an independent grazing operation would require significant capital inputs, including construction of a new barn, corrals, water system, farm vehicles, etc., the costs of which would have to be amortized and recouped from annual receipts, in addition to recurring expenses. Petitioners argue, and we tend to agree, that some of the expenses the

Day report assumed, for both capital and recurring expenses, reflect an idealized, high-input, high-intensity operation that is considerably more intense than its historic use for grazing. Nonetheless, there is no dispute that establishing a new and independent grazing operation on the subject property would require significant capital costs. Even if some of the assumed expenses in the Day report are unnecessary or inflated, as petitioners contend, petitioners have not established that applying only the unchallenged assumptions would necessarily yield a different conclusion, or that a reasonable decision maker would not rely on the Day report in part to conclude that the subject property is not suitable for an independent grazing operation. Petitioners presented no expert testimony below that would undermine the Day report's ultimate conclusions with respect to the subject property's suitability for an independent grazing operation. Notwithstanding petitioners' criticisms of the Day report, we believe the report, combined with the history of the subject property, which has never included a successful or long-standing independent grazing operation, is substantial evidence supporting the county's conclusion that the property is not suitable for an independent grazing operation.

c. Grazing in Combination with Nearby Livestock Operations

A much closer question is presented with respect to whether the subject property can be used in conjunction with nearby lands to support an existing grazing operation, similar to its historic agricultural use. As noted, OAR 660-033-0030(3) provides that "Goal 3 attaches no significance to the ownership of a lot or parcel when determining whether it is agricultural land" and requires that "[n]earby or adjacent land, regardless of ownership, shall be examined" in determining whether the subject property is suitable for farm use. The subject property has a long history of use in conjunction with nearby lands. As noted in *Wetherell I*, the Mellors have a grazing operation on their nearby lands and also lease the Napier parcel, the other half of the former ranch that once included the subject property. The Mellors leased the subject property for five or six years in the 1990s in conjunction with their

existing grazing operation, for seasonal grazing of 60 cow-calf pairs. During the remand proceedings, the Mellors testified that they "were able to successfully run a cattle operation" using the subject property, expressed interest in again leasing or purchasing it, and stated that they believed they "would be able to make a profit raising cattle using both of the properties." Record 1043.

In *Wetherell I*, we commented that "[t]he 70-year history of grazing use in conjunction with the Napier parcel, and the absence of a sufficient reason to believe that the subject property could not be used again with the Napier parcel, or the Mellor parcel, for that matter, would seem to compel the conclusion that the subject property is agricultural land." 50 Or LUBA at 192, n 13. In our view, testimony of nearby ranchers that they have in the past successfully ranched the subject property in conjunction with their own grazing operation, that they are willing to do so again, and that they believe they could do so profitably is more than sufficient to conclusively negate any general claims that property cannot be used in conjunction with nearby farm operations, or that conjoined use could not be profitable.

The question in the present case is whether the Day report is sufficient to overcome the above testimony, and provide a basis for the county to conclude that the subject property cannot be used in conjunction with nearby lands to conduct farm use. There is no possible dispute that the subject property can be physically used in conjunction with the Mellors' grazing operation; the only remaining issue is whether such use would constitute "farm use as defined at ORS 215.203(2)(a)," that is, whether the Mellors would employ the subject property "for the primary purpose of obtaining a profit in money[.]"[15]

[15] Notwithstanding our previous comments that profitability is a relatively minor consideration for purposes of OAR 660-033-0020(1)(a)(B), as the issues have narrowed in the present case, it has inevitably taken on considerable importance. We repeat, however, that in general considerations of profitability should not overshadow consideration of the factors listed in the rule.

The Day report did not specifically evaluate whether the subject property could be used in conjunction with the Mellor operation, but instead took the approach of concluding that any combined operation would still be subject to many of the expenses listed in the report for an independent grazing operation, and that such expenses would still far exceed any revenue that could reasonably be expected from the subject property. Therefore, the Day report concluded, conjoined use of the subject property would be a losing component of any combined operation. The report rejected the Mellors' belief that they could use the property in conjunction with their own operation with the expectation of deriving a profit thereby as a mere "expression of American optimism." Record 208.

The county found, based on the Day report:

> "Combining a grazing operation on the subject property with operations on other nearby properties is considered in the Day reports. * * * The budget analyses in the Day reports show that the subject property would be a component that would lose money for the operator of a combined operation. * * * This is based on the critical assumption that accepted farming practices are used. As the Day reports note, profit might be possible by mismanaging the operation and deviating from the USDA standard of a high level of management of the property. However, any such profit would be short-term and at the cost of the overall productivity of the subject property (e.g., neglecting fertilization, failing to maintain fences). Long-term damage to the property from mismanagement is especially likely because the thin droughty soils are unforgiving of management error; this likely occurred in the past on the subject property. The credibility of neighbors who claim they would make a profit grazing the subject property is seriously undercut by their failure to produce even a single budget, tax return, or financial statement showing that profit has occurred, is likely, or is possible." Record 18.

As petitioners note, a representative of the Department of Land Conservation and Development (DLCD) submitted comments during the proceedings below that "[t]he speculative 'expenses' noted by the consultant for a leasing scenario are less reliable and meaningful than the more accurate data that can possibly be had from the prospective lessee. The subject property needs to be evaluated in conjunction with the Mellors' property before it can be determined not be suitable for farm use." Record 67. We generally agree with the observation that a hypothetical analysis such as the Day report is inherently less reliable than

the experience of nearby ranchers who have actually used the subject property in conjunction with their own. Nonetheless, as the decision notes, the Mellors provided no data to support their belief that conjoined use of the subject property would be for the primary purpose of obtaining a profit in money. We disagree with the county that the Mellors are required to submit tax or personal financial information to establish that their existing operation is profitable or that conjoined use would be profitable. However, when presented with the kind of detailed, if speculative, budget offered in the Day report, it is not unreasonable for the county to expect some rebuttal information supporting the Mellors' belief that using the subject property in conjunction with their grazing operation would constitute farm use as defined at ORS 215.203(2)(a), *i.e.*, that use can be conducted with the primary purpose of obtaining a profit in money. That information might have come in the form of a proposed budget, or simply some explanation for how the Mellors anticipated they would use the subject property in conjunction with their other operations, and why they believed the combined operation would be financially beneficial to them.[16]

Although it is a close question, we believe that in the absence of such rebuttal information the county was entitled to rely on the Day report to conclude that no combined grazing operation could constitute farm use of the subject property as defined at ORS 215.203(2)(a), and therefore the property cannot be used in conjunction with adjacent or nearby lands, for purposes of OAR 660-033-0030(3).

The first sub-assignment of error is denied.

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[16] We note that such financial benefit would not necessarily be limited to revenue directly produced from using the subject property, compared to the direct expenses of using the subject property, as the Day report appears to assume. A combined operation presumably could increase the efficiency or productivity of the Mellors' agricultural operations on their nearby land in various ways. For example, using the subject property for seasonal grazing might allow the Mellors' to rest their pastures and reduce costs or increase productivity, and the Mellors might reasonably believe that such decreased costs or increased productivity might offset any direct financial losses associated with using the subject property. In other words, an economic analysis of a combined operation should focus on the entire combined operation, not limited to the revenues and expenses directly associated with use of the subject property. However, as noted, the Mellors did not explain how they might use the subject property or why they believed that use would be financially beneficial to their operation.

2. Second Sub-Assignment of Error

a. Agriculture and Woodlot

Petitioners contend that the county erred in failing to consider the potential profitability of a combined agricultural and forestry operation on the subject property, including grazing, a vineyard, and harvesting of timber from woodlots. Petitioners do not dispute the county's conclusion that the subject property is not commercial forest land protected under Goal 4, but argue that harvesting of timber from small woodlots is a "farm use" under Goal 3. According to petitioners, ORS 215.203(2)(b)(H) defines the "'current employment of land' for farm use" to include "land constituting a woodlot, not to exceed 20 acres, contiguous to and owned by the owner of land specially valued for farm use even if the land constituting the woodlot is not utilized in conjunction with farm use." Petitioners note that the subject property has been logged, most recently in 1996, and that intervenor obtained permits to harvest timber on the property in 2006 and 2007. Therefore, petitioners argue, in evaluating profitability for purposes of OAR 660-033-0020(1)(a)(B), the county must take into account any income received from timber harvesting.

Intervenor responds, initially, that any issue regarding woodlots as a farm use as been waived, because it was not raised in the previous round of appeals and was not part of LUBA's remand. *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992) (issues that could have been, but were not, raised during the initial proceedings cannot be raised on an appeal of the decision on remand). Petitioners reply that the issue was raised during the remand proceedings. We agree with intervenor, however, that the issue of considering woodlots as a farm use for purposes of OAR 660-033-0020(1)(a)(B) could have been raised during the initial rounds of appeal, but was not, and that issue is therefore waived under *Beck*.

b. Vineyard Operation

One of the issues remanded in *Wetherell IV* was whether a commercial vineyard could be established on the subject property, on a 19 to 20-acre portion with Class II-IV soils suitable for growing grapes in the region, as suggested by opponents. On remand, intervenor submitted a study by an viticultural expert (Biehl), which concluded that the capital costs of establishing a vineyard on the subject property would exceed the likely revenue, at all points within a 100-year time frame, in part because the property lacks irrigation deemed necessary to establish a commercial vineyard. The county relied on the Biehl study in part to conclude that the subject property is suitable for viticultural use and therefore not "suitable for farm use" under OAR 660-033-0020(1)(a)(B).

Under this sub-subassignment of error, petitioners challenge the methodology and assumptions used by the Biehl study. Petitioners cite to opposing testimony, some from regional vineyard operators, and argues that the county should have relied instead on that testimony to conclude that, if managed differently than assumed under the Biehl study, a reasonable farmer would be motivated to attempt to establish a vineyard on the property, for the primary purpose of making a profit in money.

Intervenor responds that Biehl submitted a supplement addressing the testimony from opponents and justifying the approach and assumptions used. Intervenor contends that the study and supplement constitute substantial evidence on which the county was entitled to rely. We agree with intervenor that petitioners have not established that a reasonable decision maker could not rely on the Biehl study to conclude that the property is unsuitable for a viticultural operation. The county is entitled to choose between conflicting expert testimony, as long as a reasonable person could rely on the expert testimony the county chose to believe. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *Molalla River Reserve, Inc. v. Clackamas County*, 42 Or LUBA 251, 268 (2002).

The second sub-assignment of error is denied.

The assignment of error is denied.

The county's decision is affirmed.